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No. 86-734

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROTHERY STORAGE & VAN CO., *et al.*,
Petitioners,

v.

ATLAS VAN LINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR ATLAS VAN LINES, INC. IN OPPOSITION

JAMES VANR. SPRINGER
(Counsel of Record)
R. BRUCE HOLCOMB
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for Respondent Atlas Van Lines, Inc.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the district court and Court of Appeals correctly held, on the undisputed facts developed after completion of liability discovery, that a moving van line's policy of prohibiting its agent companies from also engaging in competing interstate moving on their own account was not an unreasonable restraint of trade.

LIST OF PARTIES AND RULE 28.1 INFORMATION

While there were a number of additional parties at various earlier stages of the proceeding below in the district court, the only parties remaining in the Court of Appeals were eight of the original plaintiffs (Rothery Storage & Van Co.; A. Walecka & Son, Inc.; Camp Curtin Transfer, Inc.; J. Fishman & Son, Inc.; Richard Coriell & Company; Warsaw Moving & Storage, Inc.; ABC Relocation Services, Inc.; and Dobson the Mover)* and defendant Atlas Van Lines, Inc. (respondent here).

Respondent Atlas Van Lines, Inc. has no parent, subsidiary or affiliate whose securities are publicly owned.

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* A number of the plaintiffs did not appeal to the Court of Appeals. The Petition does not list the petitioners other than Rothery Storage & Van Co.; while it notes at page iv that "[p]etitioners * * * were appellants below," it does not indicate whether all of the appellants are petitioners.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 28.1 INFORMATION	i
OPINIONS BELOW	1
STATEMENT	1
A. Factual Background	2
B. The District Court Decision	8
C. The Court of Appeals Opinions	13
REASONS WHY THE PETITION SHOULD BE DENIED	15
CONCLUSION	21

TABLE OF AUTHORITIES

Cases: Page

American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975) 19
Atlas Van Lines, Inc., 70 M.C.C. 629 (1957), 75 M.C.C. 175 (1958) 4
Black v. Cutter Laboratories, 351 U.S. 292 (1956) .. 20
Board of Trade of City of Chicago v. United States, 246 U.S. 231 (1918) 11
Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1 (1979) 13, 14, 19
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 20
Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) 9, 11, 18
Continental T.V., Inc. v. G.T.E. Sylvania Inc., 694 F.2d 1132 (9th Cir. 1982) 18
Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 9
FTC v. Indiana Federation of Dentists, 106 S. Ct. 2009 (1986) 16, 17
General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588 (7th Cir. 1984) 16, 17, 20
Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984) 16
Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 369 U.S. 1062 (1970) 19
Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368 (5th Cir. 1977) 19
Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) 9, 18
National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984) ..... *passim*
National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 11
Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 105 S. Ct. 2613 (1985) 13, 14, 19

TABLE OF AUTHORITIES—Continued

	Page
Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978)	10
United States v. Colgate & Co., 250 U.S. 300 (1919)	9
United States v. Sealy, Inc., 388 U.S. 350 (1967)	14, 20
United States v. Topco Associates, Inc., 405 U.S. 596 (1972)	14, 20
Statutes:	
Sherman Act § 1, 15 U.S.C. § 1	*passim*
49 U.S.C. § 10934	*passim*
49 U.S.C. §§ 11341-11342	4
Motor Carrier Act of 1980, 94 Stat. 793	5
Legislative history:	
S. Rep. No. 96-497, 96th Cong., 1st Sess. (1979)	11
Miscellaneous:	
Handler, Twenty-five Years of Antitrust (1973)	18
Pitofsky, The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions, 78 Colum. L. Rev. 1 (1978)	18
Policy Statement on Motor Carrier Regulation, 44 Fed. Reg. 60296 (1979)	5
Practices of Motor Common Carriers of Household Goods; Revision of Operational Regulations, 46 Fed. Reg. 16200 (1981), *aff'd*, North American Van Lines, Inc. v. ICC, 666 F.2d 1087 (7th Cir. 1981)	6
Supreme Court Rules 17, 21	15

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BRIEF FOR ATLAS VAN LINES, INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the district court granting summary judgment for respondent (Pet. App. 47a) is reported at 597 F. Supp. 217. The majority and concurring opinions of the Court of Appeals affirming the district court (Pet. App. 1a and 42a) are reported at 792 F.2d 210.

STATEMENT

Petitioners ask this Court to review the Court of Appeals' unanimous affirmance (in two separate opinions)

of the district court's fully reasoned decision on cross-motions for summary judgment following completion of exhaustive liability discovery. Here, as below, there is no serious dispute as to the facts that the courts below found determinative.[1] The only possible question here is whether any legal issue warranting this Court's attention underlies the conclusion that the challenged "carrier-agent policy" of respondent Atlas Van Lines, Inc. ("Atlas") is not an unreasonable restraint of trade under Section 1 of the Sherman Act, 15 U.S.C. § 1.

A. Factual Background

Atlas is one of a substantial number of nationwide interstate common carriers of household goods. It is the sixth largest van line, with a national market share of less than 6 percent (Pet. App. 14a n.3).[2] Like the other major van lines, Atlas operates through a nationwide network of independently owned companies which Atlas has selected to act as its agents in moving shipments under

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[1] The district court found that "plaintiffs and defendant are in substantial agreement on the essential facts making up the core of this case" (Pet. App. 76a). In analyzing the statements of material facts filed pursuant to D.D.C. Local Rule 1-9(h) [now 108(h)], the district court noted that "[c]lose comparison of plaintiffs' assertions discloses that while many of them challenge the implications or characterizations of defendant's statements, they do not effectively traverse them so as to put material facts into genuine dispute." (Pet. App. 50a-51a n.2) Because the district court's opinion copiously refers to the undisputed facts in the record, our statement of facts here principally cites that opinion. The petition makes numerous assertions which distort the undisputed facts or are unsupported by evidence in the record, but they are largely immaterial and no purpose would be served by refuting them here. The Court of Appeals noted that petitioners' argument there took some improper liberties with the record. (Pet. App. 23a-24a n.9)

[2] The 1981 market shares of the 15 largest van lines are set out at Pet. App. 20a n.7.

Atlas' ICC authority (Pet. App. 51a-52a).[3] Standardized agency agreements require the agents to conform with operating procedures and standards specified by Atlas, which establishes rates and coordinates shipments (Pet. App. 51a-52a & n.2). The Court of Appeals accurately summarized as follows the relative roles of Atlas and its agents in the integrated enterprise:

> "The agents find customers and do the packing, loading, hauling, and storage. Atlas sets the rates, dispatches shipments, chooses routes, arranges backhauls so the agent's truck need not return empty, arranges services at the origin and destination of shipments, collects all revenues and pays the agents, establishes uniform rules for the appearance and quality of equipment, trains salespeople and drivers, purchases and finances equipment for use by the agents, and maintains insurance on all shipments made under Atlas' authority. In addition, Atlas conducts national advertising and promotional forums. With the assistance of agents, it handles customer claims." [Pet. App. 3a] [4]

The Interstate Commerce Act makes Atlas responsible to customers for "all acts or omissions of any of its agents which relate to the performance of household goods transportation services (including accessorial or terminal services) * * * and which are within the actual or apparent authority of the agent from the carrier * * *." 49 U.S.C. § 10934(a). Atlas is further required, as a "carrier providing transportation of household

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[3] Atlas was formerly a publicly owned corporation listed on the American Stock Exchange, but is now privately owned. A minority of Atlas' stock is owned by a few of its agents.

[4] The undisputed facts underlying this summary were set forth in ¶¶ 2-16 of Defendant's Statement Of Material Facts As To Which There Is No Genuine Issue ("DSF") and were not significantly contradicted by plaintiffs. See Pet. App. 50a-51a n.2. The separate opinions in the Court of Appeals did not differ in their views of the facts.

goods," to "use due diligence and reasonable care in selecting and maintaining agents who are sufficiently knowledgeable, fit, willing, and able to provide adequate household goods transportation services * * * and to fulfill the obligations imposed upon them by the Interstate Commerce Act] and by such carrier." 49 U.S.C. § 10934 (b).

As is typical in the industry, Atlas has long required that its agents not work for any other van line (Pet. App. 59a-60a). However, prior to the adoption of the "carrier-agent policy" at issue here, 91 of Atlas' 490 odd-agents were "carrier-agents," *i.e.*, were permitted under a joint "pooling agreement" to carry household goods under independent ICC authority of their own in addition to serving as Atlas agents.[5] The district court explained the advantages of such carrier-agent status as follows:

> "[A] carrier-agent may * * * accept certain shipments for carriage on its own account—rather than that of the principal carrier for which it serves as an agent—when the distance of the shipment does not exceed the geographic range of its independent authority and when other factors render it profitable for the carrier-agent to do so. * * * Some carrier-agents, moreover, enjoy the distinct benefit of using van line personnel, van line uniforms and equipment (with van line insignia), and van line origin and destination services even on shipments carried out on their own, independent authority, * * * and thus can avoid the costs of building the business infrastructure necessary to exercising their independent carrier authority effectively. * * * Atlas carrier-agents, for example, enjoyed this latter benefit prior

[5] The pooling agreement between Atlas and such agents had been approved by the ICC, *Atlas Van Lines, Inc.*, 70 M.C.C. 629 (1957), 75 M.C.C. 175 (1958), and therefore was exempt from application of the antitrust laws under 49 U.S.C. §§ 11341-11342. See Pet. App. 4a.

> to the events at issue in this lawsuit." [Pet. App. 56a-57a]

The Court of Appeals noted that "[b]y their own assertions, appellants establish that the carrier agents in the Atlas organization have benefited from Atlas' business infrastructure in carrying shipments made for their own accounts" (Pet. App. 23a) and agreed with the district court "that many of the services supplied as part of Atlas' arrangement with the carrier agents' arrangement resulted in Atlas subsidizing its competitors" (Pet. App. 25a; see Pet. App. 115a).

Until the late 1970s, the extent of carrier-agents' independent interstate operations was limited by regulatory restrictions on common carrier authority. Moreover, ICC regulations in force until 1981 required that carrier-agents use the same tariffs as their principal carriers when carrying shipments under independent authority. (Pet. App. 62a-63a) Thus, the regulatory scheme confined within relatively narrow bounds the scope of competition between agents and their van line system, and thereby mitigated the conflict between a carrier-agent's self-interest in maximizing use of its own authority and its duties as an agent for its van line.

In the Court of Appeals' words, "[t]he deregulation of the moving industry, beginning in 1979, produced changes that had a profound impact on the relationship between van lines and their agents" (Pet. App. 4a); the district court similarly found "a dramatic change in [the] business circumstances" under which Atlas had allowed its agents also to compete with the van line as independent interstate carriers (Pet. App. 63a). The ICC's 1979 *Policy Statement on Motor Carrier Regulation*, 44 Fed. Reg. 60296, and the Motor Carrier Act of 1980, 94 Stat. 793, made it much easier for agents to obtain and expand independent authority. The Household Goods Transportation Act of 1980, 94 Stat. 2011, added a new provision (49 U.S.C. § 10934(a), quoted at

p. 3, *supra*) imposing strict responsibilities upon van lines for acts of their agents "within [their] actual or apparent authority." And then the ICC revoked its rule forbidding price or service competition between carrier-agents and their principal carriers. *Practices of Motor Common Carriers of Household Goods; Revision of Operational Regulations*, 46 Fed. Reg. 16200, 16212 (1981), *affd, North American Van Lines, Inc.* v. *ICC*, 666 F.2d 1087 (7th Cir. 1981).

> "Thus, as a result of deregulation, Atlas faced the prospect of potential Atlas shipments being shifted to independent carrier-agent accounts 1) by many more agents than before, 2) on long distance hauls as well as local hauls, and 3) with greater frequency due to newly authorized price competition from its carrier-agents in their independent capacities. * * * Atlas carrier-agents, nevertheless, continued to reap a substantial benefit from the use of the Atlas infrastructure * * *. After deregulation, moreover, this practice threatened to saddle Atlas with significant liability problems * * *." [Pet. App. 64a-65a]

In response to these new conditions, Atlas' management and board of directors decided that structural changes had to be made in its agency system. Following several proposals and initiatives that were almost immediately abandoned,[6] Atlas adopted in February 1982 the "carrier-agent policy" upon which plaintiffs' claims below focused. Under this new policy, Atlas withdrew from the "pooling agreement" under which carrier-agents had functioned and announced that it would not continue to have agents holding independent interstate authority; any agent can, however, have a "carrier affiliate" under common ownership if the affiliate operates under a new and distinct name outside the Atlas network. (Pet. App. 66a-69a; see Pet. App. 5a-6a) Following unsuccessful chal-

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[6] These various abortive proposals and initiatives are discussed in the district court's opinion at Pet. App. 66a-67a n.6 and 124a n.22.

lenges by petitioners and other carrier-agents at the ICC[7] and the district court's denial of a preliminary injunction in the present action,[8] the policy went into effect in August 1983 (Pet. App. 71a). Thereafter, a majority of the 91 former Atlas carrier-agents shifted their independent authority to carrier affiliates under common ownership, 20 abandoned their independent authority, and 23 ceased to be Atlas agents; many of the last group joined other national van lines which continued to accept carrier-agents (Pet. App. 71a-72a).

Although the courts below correctly deemed the independent policies of other van lines concerning carrier-agents immaterial to the lawfulness of the Atlas policy, it should be noted that the assertions on this subject at pages 18-20 of the petition do not accurately reflect the undisputed evidence in the record. In fact, as the district court noted, petitioners and others dissatisfied with the new Atlas policy had the viable alternative option of joining "one of the other van lines that do subsidize carrier-agents * * *" (Pet. App. 115a).[9] The premise of petitioners' first question that there were "parallel restraints by leading firms foreclosing in the aggregate over 70% of the market" (Pet. *i*) is entirely unfounded, both for this reason and because there is no basis for any claim of market concentration.[10] Moreover, there is

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[7] See Pet. App. 69a-71a.

[8] *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 1983-1 Trade Cas. [CCH] ¶ 65,331 (March 30, 1983). Petitioners and others appealed from both the ICC decisions and the denial of a preliminary injunction, but dismissed the appeals before oral argument.

[9] The information provided by the five largest van lines in response to plaintiffs' discovery requests showed that three of them still welcomed carrier-agents. Statement Of Material Undisputed Facts In Support of Plaintiffs' Motion for Partial Summary Judgment As To Liability ("PSF") Appendix G.

[10] The derivation of petitioners' 70% figure is nowhere explained; much less is there any record support for the statement (Pet. 9)

no evidence anywhere in the record suggesting the slightest concert among van lines with respect to their varied policies concerning carrier-agents.

B. The District Court Decision

The district court's decision followed the completion of exhaustive discovery on all liability issues and was based upon a voluminous record of deposition transcripts and documents. Plaintiffs did not offer any showing of need for additional discovery and, as noted above, there has never been any substantial dispute as to the facts upon which the courts below relied in granting and affirming summary judgment in Atlas' favor. See p. 2, n.1, *supra*.

In a lengthy opinion (Pet. App. 47a-125a), the district court held that the challenge to Atlas' carrier-agent policy failed as a matter of law because "[t]he undisputed facts demonstrate that plaintiffs in this action cannot meet either of [the Sherman Act § 1] criteria," *i.e.*, cannot show the existence of *either* a "contract, combination * * * or conspiracy" *or* "an unreasonable restraint of trade under either the *per se* rule or the rule of reason, as appropriate." (Pet. App. 76a-77a)

With respect to the first criterion, the court held that neither the action of the Atlas Board of Directors in adopting the carrier-agent policy nor the communications by which it was promulgated to agents involved the requisite concert of action, for two independent reasons: (1) because 49 U.S.C. § 10934(d) categorically immunizes

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that six van lines carry "80% of the longer haul interstate household goods shipments." In fact, stipulated market share data showed that a total of 15 van lines account for 70% of the market (Pet. App. 14a n.3). It is indisputable, as the Court of Appeals noted, that the interstate household goods moving market is "*low* on the range of *unconcentrated* markets" (Pet. App. 20a) and that "interbrand competition * * * is intense in the van line industry * * *" (Pet. App. 21a n.8). And Atlas, with less than 6%, "is by no means a dominant force in the market" (Pet. App. 14a n.3).

the deliberations of a van line's board of directors and the van line's communications with its agents concerning their ownership of other common carriers;[11] and (2) because there was no evidence to support any inference either that the Board members were acting otherwise than on behalf of the unitary interests of Atlas[12] or "that Atlas's actions amounted to anything other than the unilateral announcement of a policy change and its subsequent implementation" (Pet. App. 97a), *i.e.*, a situation inconsistent with the notion of any "conscious commitment to a common scheme" on the part of the agents.[13]

The district court then went on to hold further that—even assuming concerted action and no statutory immunity—the undisputed facts would preclude both plaintiffs' *per se* claim that the carrier-agent policy was a boycott and price maintenance scheme and plaintiffs' alternative claim that the policy violated the rule of reason (Pet. App. 100a-101a).

As to the *per se* claim, the district court took for its text the principle of *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977), as restated locally

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[11] Pet. App. 81a-89a, 96a-97a. This section of the Interstate Commerce Act, added in 1980, provides in pertinent part:

> "The antitrust laws * * * do not apply to discussions or agreements between a motor common carrier providing transportation of household goods * * * and its agents (whether or not an agent is also a carrier) related solely to * * * (4) ownership of a motor common carrier * * * by an agent or membership on the board of directors of any such motor common carrier by an agent."

[12] Pet. App. 77a-81a, 89a-95a. The court here relied on *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), and related cases.

[13] Pet. App. 97a-99a. The court here relied on *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and its confirmation of the continuing vitality of *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919).

in *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173, 1181 (D.C. Cir. 1978), that "[*p*]*er se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." (Pet. App. 102a-104a) Noting the "unique nature of the business relationship between van lines and their carrier-agents," the uncertain impact of deregulation, the indisputable tendency of the new policy to "enhance inter-carrier competition among the national van lines" and the fact that the new policy "represents nothing more than the adoption of a method of operation—exclusive agency—that is 'widely used' not only in the van line industry, but throughout commerce," the district court concluded that

> "[T]he 'demanding standards' for application of *per se* treatment have simply not been met. Rather, 'the courts have had too little experience with this type of restraint, and know too little of the 'economic and business stuff' from which it issues, confidently to declare it illegal without undertaking the analysis enjoined by the rule of reason.'" [Pet. App. 107a, citing *Smith*, 593 F.2d at 1182]

Turning to the rule of reason claim, the district court applied the classic test which the D.C. Circuit's *Smith* decision had summarized as follows:

> "Under the rule of reason, a restraint must be evaluated to determine whether it is significantly anticompetitive in purpose or effect. In making this evaluation, a court generally will be required to analyze 'the facts peculiar to the business, the history of the restraints, and the reasons why it was imposed.' If, on analysis, the restraint is found to have legitimate business purposes whose realization serves to promote competition, the 'anticompetitive evils' of the challenged practice must be carefully balanced against its 'procompetitive virtues' to ascertain whether the former outweigh the latter. A restraint is unreasonable if it has the 'net effect'

of substantially impeding competition." [Pet. App. 108a, quoting from 593 F.2d at 1183] [14]

The district court noted at the outset of its rule of reason analysis that "[c]lassic agency law * * * gives a principal the prerogative of withdrawing [its agents'] permission [to compete with the principal] if convenient to protect the principal's interests" (Pet. App. 109a), and that Congress had indeed endorsed this prerogative of a van line as consistent with the antitrust laws in its 1980 revision of the governing legislation (Pet. App. 109a-112a).[15] The court went on to find that there could be no adverse effect upon *competition* (as distinguished from plaintiffs as *competitors*) because Atlas agents remained free to have carrier affiliates under common ownership or to become carrier-agents for other van lines.

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[14] The quoted passage in turn draws upon *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978), *Continental T.V., supra*, and *Board of Trade of City of Chicago* v. *United States*, 246 U.S. 231 (1918).

[15] The court quoted and discussed the following statement in the Senate Report on enactment of the Household Goods Transportation Act of 1980, S. Rep. No. 96-497, 96th Cong., 1st Sess. 8 (1979):

> "During the course of its deliberations, the Committee considered a proposal to include within the immunity section [49 U.S.C. § 10934(d)] language that would grant immunity to agreements concerning exclusive agency representation, or the fiduciary duty of loyalty of an agent not to compete with the principal concerning the subject matter of the agency. The Committee determined that *this type of relationship is not a violation of the antitrust laws and is standard agency law* as expressed in Section 393 of the Restatement of the Law of Agencies section. The Committee felt that inclusion of such language could imply that such relationships are a violation of the antitrust laws in the absence of immunity. Thus, the Committee determined not to include such language in the bill." [Emphasis added]

The Court of Appeals also viewed this congressional statement as indicative of "the utility of restraints of the sort Atlas imposes." (Pet. App. 34a).

> "[T]he true effect of the Atlas policy is, in essence, only to prevent agents who do exercise independent authority from appropriating to themselves any aspect of the Atlas network for the support services and overhead equipment necessary to operate that interstate authority beyond any great distance. The new arrangement essentially terminates a subsidy previously available to an Atlas carrier-agent at the expense of Atlas. At the same time, agents who wish to continue to operate as 'carrier-agents' are not barred from seeking to join one of the other van lines that do subsidize carrier-agents in this way. Thus, the only enduring anticompetitive harm demonstrated by the plaintiff is the loss of the opportunity to continue to operate in a traditional carrier-agent relationship with Atlas itself." [Pet. App. 114a-115a]

Finally, the district court found that even if there were any "legally cognizable anticompetitive effect,"

> "there stands balanced against it the plain and significant procompetitive impact on competition among the national van lines. Plaintiffs do not dispute in any material way that enforcing traditional agent loyalty from Atlas agents will strengthen Atlas's competitive position vis-a-vis the other national van lines, particularly those that already require their agents to work with them alone. Plaintiffs concede that carrier-agency reduced the amount of traffic carried on Atlas's account * * * and cannot plausibly argue that carrier-agency did not or would not expose Atlas to increase liability—at least to some extent—for shipments carried out under Atlas's actual or *apparent* authority. * * * Atlas's new policy eliminated these competitive vulnerabilities, and thus, as shown above, had a legitimate business purpose with a plain procompetitive effect." [Pet. App. 122a-124a]

C. The Court of Appeals Opinions

The Court of Appeals affirmed, with a majority opinion by Judge Bork (in which Judge Ruth Bader Ginsburg joined) and a concurring opinion by Judge Wald. Judge Bork's opinion proceeded from the premise that Atlas' carrier-agent policy should be treated as a horizontal agreement, cognizable under the antitrust laws, by which Atlas and potentially competing agents set terms on which they would compete with one another. This premise was based upon a briefly articulated rejection of the district court's conclusion that the plurality of actors required by Sherman Act § 1 was lacking (Pet. App. 8a-9a) and a determination not to reach the question of statutory exemption under 49 U.S.C. § 10934(d) "[b]ecause the reasonableness of the restraint is so clear" (Pet. App. 7a). Judge Bork's opinion then went on to agree (as did Judge Wald's) with the district court's alternative conclusion that the carrier-agent policy did not fall into any category of *per se* illegality and conformed with the rule of reason.

In holding that petitioner's boycott theory did not establish any *per se* violation, Judge Bork's opinion relied particularly on this Court's intervening decision in *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 105 S. Ct. 2613 (1985) (Pet. App. 12a-13a, 38a-39a). In holding that petitioners could not fit the policy into any "price maintenance" or other *per se* mold, the opinion relied as well on *Broadcast Music, Inc.* v. *Columbia Broadcasting System* (*"BMI"*), 441 U.S. 1, 19-20 (1979), and *National Collegiate Athletic Ass'n* v. *Board of Regents of the University of Oklahoma* (*"NCAA"*), 468 U.S. 85, 99-102 (1984), concluding that the Atlas policy tended to have "redeeming competitive virtues" that were "reasonably necessary" to preserve the efficiencies of the van line system (Pet. App. 33a-40a).

In the course of a lengthy dissertation on the application of the Sherman Act to joint ventures and other horizontal integrations, Judge Bork opined that a general rule that all "horizontal eliminations of competition among legally independent persons or companies are automatically illegal" could have been inferred from *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972), and *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967) (Pet. App. 30a-32a). His opinion concluded, however, that "to the extent that *Topco* and *Sealy* stand for the proposition that all horizontal restraints are illegal *per se*, they must be regarded as effectively overruled" in the light of *BMI*, *NCAA* and *Northwest Wholesale Stationers* (Pet. App. 32, 35, 37, 39).

Like the district court's opinion and the concurrence, the majority opinion concluded that the undisputed facts also showed the Atlas carrier-agent policy to be consistent with the rule of reason. It found this to be so, based on an analysis of "the economic nature and effects of the system Atlas has created" (Pet. App. 13a), for two reasons: (1) because Atlas' share of less than 6% of the unconcentrated and intensely competitive nationwide moving market precluded any significant anticompetitive effect from a limitation on competition among Atlas agents (Pet. App. 14a, 19a-22a); and (2) because in any event "the record made in the district court demonstrates that the challenged agreement enhances the efficiency of the van line. The chief efficiency * * * is the elimination of the problem of the free ride." (Pet. App. 22a) Within the term "free ride," the opinion encompassed essentially all of the problems to which the district court's analysis of procompetitive effects had referred, including carrier-agents' ability to attract independent business based on "Atlas' 'national image'" and their use of the Atlas network for handling such business, all "at Atlas' expense" (Pet. App. 22a-25a). It noted the inevitable tendency of such free riding to undermine the effectiveness of the Atlas system (Pet. App. 25a-26a), and concluded:

> "The restraint at issue in this case, therefore, is a classic attempt to counter the perceived menace that free riding poses. By compelling carrier agents to transfer their interstate authority to a separate entity, Atlas can continue providing services at optimal levels, confident that it will be paid for those services.
>
> "The Atlas agreements thus produce none of the evils of monopoly but enhance consumer welfare by creating efficiency." [Pet. App. 26a]

Judge Wald's separate opinion concurred "in the result and in much of the reasoning of the panel's opinion," but expressed "several concerns * * * about the panel's analysis once it establishes that no *per se* violation existed and the restraint should be looked at under the rule of reason" (Pet. App. 42a). In particular, Judge Wald was "uncomfortable" with Judge Bork's "suggestion" that an absence of market power *alone* could suffice to avoid condemnation under the rule of reason even apart from the efficiency-producing virtues that his opinion alternatively described. She would, rather, have upheld the lawfulness of the Atlas carrier-agent policy on the basis of the "totality of circumstances," relying on both prongs of the analysis.

REASONS WHY THE PETITION SHOULD BE DENIED

Although petitioners have failed to articulate the questions they would have this Court decide with the clarity required by Rules 17 and 21 of this Court's Rules, it appears that they do not challenge here the lower courts' unanimous rejection of their claim of *per se* violation of Sherman Act § 1. Rather, they challenge the application of the rule of reason, claiming that Judge Bork's majority opinion gave undue emphasis to the small market share of the Atlas system and incorrectly evaluated the procompetitive virtues that would in any event offset any accompanying restraint. Such disputes about the application of the rule of reason to the particular circumstances of this case raise no important question of

federal antitrust law, and petitioners do not point to any genuine conflict of decisions.

1. Judge Bork's suggestion that Atlas' lack of market power in an unconcentrated and intensely competitive market *alone* suffices under the rule of reason was both correct, and in any event, inessential to the Court of Appeals' conclusion. It was inessential because Judge Bork's opinion expressly stated that "we need not rely entirely upon [an inference from the absence of market power] because the record made in the district court demonstrates that the challenged agreement enhances the efficiency of the van line" (Pet. App. 22a), and then proceeded to explain those procompetitive virtues at length.[16] It was correct because, as this Court has held in *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2, 31 (1984), a violation cannot be established under the rule of reason "[w]ithout a showing of actual adverse effect on competition * * *." [17]

Contrary to petitioners' argument, the suggestion that lack of market power alone defeats a plaintiff's claim under the rule of reason in no way conflicts with *FTC* v. *Indiana Federation of Dentists*, 106 S. Ct. 2009 (1986), *NCAA*, *supra*, or *General Leaseways, Inc.* v. *National Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir. 1984). In *Indiana Federation*, there was an express "finding of

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[16] Judge Wald's concurrence, like the district court's decision, relied on both the absence of anticompetitive effects and the presence of procompetitive virtues.

[17] Petitioners do not directly contest the determinations below that the undisputed facts showed that the Atlas policy did not threaten competition. They do not supply that missing element by their assertion that "[t]he parallel use of such similar restraints [by other van lines] foreclosed the bulk of the interstate market * * *" (Pet. 44). Apart from the fact that the assertion is contrary to the undisputed facts (see pp. 7-8, *supra*), it is irrelevant to the lawfulness of a practice such as this whether or not it is also followed by others when, as here, there is no evidence of concerted action with the others.

actual, sustained adverse effects on competition" (106 S. Ct. at 2019), and in *NCAA* the Court similarly held that "[a]s a factual matter, it is evident that [the defendant] does possess market power" (468 U.S. at 111) and "[t]he anticompetitive consequences of this arrangement are apparent" (*id.* at 106). To be sure, *NCAA* also held that "the absence of proof of market power does not justify a naked restriction on price or output" (*id.* at 109) and *Indiana Federation* repeated the same point (106 S. Ct. at 2018-2019), but the Atlas carrier-agent policy is plainly not a naked restriction and Judge Bork's suggestion does not refer to naked restrictions.[18] *General Leaseways* expressly *agrees* with Judge Bork's suggestion, holding that the rule of reason requires "that the plaintiff first prove that the defendant has sufficient market power to restrain competition substantially. * * * If not, the inquiry is at an end; the practice is lawful." 744 F.2d at 596.

2. Petitioners' attack on the Court of Appeals' assessment of the procompetitive virtues of the Atlas carrier-agent policy presents no issue warranting this Court's review. Petitioners do not—and cannot—seriously question the conclusions of both courts below that the policy had been shown to have the procompetitive virtue of maintaining the efficiency of the Atlas Van Lines system in a deregulated marketplace. The gravamen of the second and third questions stated in the petition is, rather, that the courts below should have accepted petitioners' contentions that this particular policy was not essential to the survival of the Atlas van line system—*i.e.*, not the "least restrictive alternative"—and that, indeed, it reflected poor business judgment because of "substantial countervailing benefits to Atlas from its association with the carrier agents" (Pet. 59-60). Petitioners merely ask

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[18] In both *NCAA* and *Indiana Federation*, this Court accepted findings that the challenged practices produced no "procompetitive efficiencies" whatsoever. 468 U.S. at 114; 106 S. Ct. at 2018.

this Court to rehash the rule of reason evaluations made by the district court and the Court of Appeals.

Both courts explicitly found that the policy was, under the undisputed facts, a patently reasonable response to the complex of problems—capsulized by Judge Bork in the term "free riding"—which were inherent in having carrier-agents and were dramatically exacerbated by deregulation. It is well settled that protection against the erosive effects of such free riding is a prime exemplar of the procompetitive "redeeming virtues" that will justify any restriction upon competition under the rule of reason. *Continental T.V., Inc.* v. *GTE Sylvania Inc., supra*, 433 U.S. at 54-55; see *Monsanto Co.* v. *Spray-Rite Service Corp., supra*, 465 U.S. at 762-763. And justification of a restriction of this nature does not—as petitioners would have it— require that a defendant be put "in the impossible position of guaranteeing that lawyers cannot imagine some method of achieving the business purpose in question while imposing a lesser restriction on interbrand competition." Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 Colum. L. Rev. 1, 36-37 (1978); see Handler, Twenty-five Years of Antitrust 705-708 (1973). *Continental T.V.* itself foreclosed any such requirement when it noted that the restraint remanded for rule of reason analysis there was "neither the least nor the most restrictive provision that [Sylvania] could have used." 433 U.S. at 58 n.29. If only the "least restrictive alternative" could have passed muster, no further inquiry would have been needed to condemn Sylvania's location clause and there would have been no reason for a remand. Instead, Sylvania's restriction was upheld on remand. *Continental T.V., Inc.* v. *G.T.E. Sylvania Inc.*, 694 F.2d 1132, 1138 n.11 (9th Cir. 1982).

The decisions below not to second-guess the reasonable business decision of Atlas' management and board of directors as to how best to structure the van line system

in response to changing circumstances were also consistent with those of other courts of appeals in similar situations.[19]

3. Even if the questions stated by the petition were read as challenging the correctness of the lower courts' rejection of petitioners' *per se* claims—and we believe they cannot be so read—there would be no occasion for further review on that ground. Judge Bork's majority opinion put the *per se* issue in the most favorable possible light for petitioners by treating the Atlas policy as a horizontal agreement among competitors,[20] and even in that light it was plainly correct in finding no basis for a *per se* claim. *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, *supra*, forecloses any *per se* boycott claim because it is indisputable that at least some restraints upon agents' activities are essential to the operation of a van line and there are "plausible arguments" that the carrier-agent policy was "intended to enhance overall efficiency and make markets more competitive." 105 S. Ct. at 2620. And even if the policy directly restricted price competition (as it did not), such a restriction is not condemned *per se* where it is an element of a cooperative enterprise. *Broadcast Music, Inc.* v. *Columbia Broadcasting System*, *supra*, 441 U.S. at 23; *National Collegiate Athletic Ass'n* v. *Board of Regents of the University of Oklahoma*, *supra*, 468 U.S. at 99-102. The inappropriateness of trying to fit the present case into any *per se* mold is confirmed by this Court's

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[19] *E.g.*, *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1249-1250 (3d Cir. 1975); *Kentucky Fried Chicken Corp.* v. *Diversified Packaging Corp.*, 549 F.2d 368, 381 (5th Cir. 1977); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 78 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

[20] We believe the district court was correct in finding no plurality of actors and that in any event the Court of Appeals would have agreed with the district court's finding of a statutory exemption had it reached the question.

decision last Term (the day before the Court of Appeals decision below was released) in *FTC* v. *Indiana Federation of Dentists, supra*, which noted that "we have been slow * * *, in general, to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious * * *." 106 S. Ct. at 2018.

Indiana Federation's admonition against stretching *per se* rules casts doubt on Judge Bork's premise that the Atlas carrier-agent policy could be analogized to the purely horizontal market divisions condemned *per se* in *United States* v. *Sealy, Inc.* and *United States* v. *Topco Associates, Inc., supra.* In any event, Judge Bork's opinion did not strictly conclude that *Sealy* and *Topco* are "effectively overruled" on their own facts, but only "*to the extent that* [they] stand for the proposition that all horizontal restraints are illegal per se" (Pet. App. 32a, emphasis added; see also the similarly cautious language at Pet. App. 35a and 39a). Thus, the discussion of *Sealy* and *Topco* perhaps amounted to nothing more than setting up and knocking down a straw man; at most it was an academic detour that was not necessary to the result. Even if the petition properly presented such a *per se* question, it would therefore be inappropriate for further review under the familiar principle that "this Court reviews judgments, not opinions." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); see also, *e.g.*, *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES VANR. SPRINGER
(Counsel of Record)
R. BRUCE HOLCOMB
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for Respondent
Atlas Van Lines, Inc.

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